IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 720 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PUNAM @ SHOBHA OMPRAKASH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 720 of 1994
MR PM VYAS for Petitioner No. 1
Mr. S.S. Patel, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Appellant, original accused no.3, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, has challenged the judgment and order dated July 5, 1993, passed by the learned Additional City Sessions Judge, Court No. VIII, Ahmedabad, in Sessions Case No.306 of 1992, whereby, the appellant came to be convicted under Section 392 read with 397 and 34 of the Indian Penal Code and under Section 302 read with 34 of the Indian Penal Code, and sentenced to undergo R.I. for seven years and fine of Rs.500 in default R.I. for two months and R.I. for life and fine of Rs.500 in default R.I. for two months. All the sentences were ordered to be run concurrently.

2. The prosecution case, in a nut-shell, is as under: P.W.1. Natwarlal Ishwarlal, who was serving as teacher in Bapunagar Municipal School No.3, was residing in Block No.A/9/103, Vallabh Flat, Bapunagar. P.W.1, Natwarlal, had married with one Urvashiben and the said marriage had lasted for seven years and, thereafter, the first wife Urvashiben expired and, therefore, P.W.1, Natwarlal had remarried Jashoda alias Jayshreeben prior to six years of the date of the incident. The present incident took place on March 31, 1992. On March 31, 1992, the complainant, Natwaral, had gone to the school where he was serving, and at around 9.35 a.m., P.W.2, Ravidra Prempal Ravat, who was residing in the same block in third floor, came to the school of the complainant and informed him that one male person and one female person had come to his flat and they were beating his wife. P.W.1, Natwarlal, immediately went to his residence where he saw that many persons had gathered there. P.W.1, Natwarlal, had entered his flat and found his wife Jashoda alias Jayshree lying in bleeding condition on the floor of the kitchen. It was found that said Jayshreeben had already expired. P.W.1, Natwarlal, found that the safe (cub-board) which was kept in another room, was opened and two golden bangles weighing 4 tolas and 3 golden rings and one golden chain and two golden doras and cash amount of Rs.14,000/- were missing. The total amount of the stolen property was Rs.61,400/-. P.W.1, Natwarlal, immediately informed Bapunagar Police Station and lodged his complaint. The said complaint was registered at CR No.I-100/92 at the Bapunagar Police Station. P.W.13, S.S. Chudasama, who was discharging his duties as Police Inspector at the Bapunagar Police Station, took over the investigation and held inquest of the dead body of Jayshreeben. Postmortem of the

dead-body was performed by P.W.12, Dr.N.N. Parikh. P.W.13, PI, S.S. Chudasama, had drawn panchanama of place of incident and had recovered bloodstained knife and other incriminating articles from the place of the incident under a panchanama. On the same day, P.W.13, PI, S.S. Chudasama, recorded statements of the witnesses, P.W.2, Ravindra Prempal Raval, Jitendra Devshanker Shelat, Sudhaben Devshanker Shelat, Shilaben Rawal and Meenaben. P.W.13, PI, S.S. Chudasama, had enquired whereabouts of the absconding accused Omprakash Swaminathan and the present appellant and they were not available at their house. It was learnt by P.W.13, PI, S.S. Chudasama, that they had vacated their house and had gone elsewhere. On April 1, 1992, P.W.13, PI, S.S. Chudasama, had recorded statement of P.W.6, Govindbhai Laljibhai Dhobi, who was the owner of Bhagyoday Cleaners, and had seized jeans pant which was given to the cleaners for washing purpose. Search was carried out by the Investigating Agency to trace out the absconding accused, Omprakash and the appellant and the brother of the absconding accused. On May 19, 1992, PSI Patil of 'D' Staff, was entrusted with the work to trace out the absconding accused who had gone to Uttar Pradesh. Accordingly, PSI Patil, who had gone to Uttar Pradesh, had arrested the present appellant who was brought to Ahmedabad on May 27, 1992. Arrest panchanama of the appellant was drawn and from the suitcase a pink colour saree which she was carrying was seized. While in custody of Bapunagar Police Station, the appellant had shown her willingness to show the place of goldsmith, PW 7, Kalidas Ambalal Chokshi, where she had sold the gold ornaments stolen from the flat of the complainant, Natwarlal. Accordingly, two panchas were called and, in their presence, the appellant was taken in a police jeep to Manek Chowk. The appellant had taken the police party and the panchas to the shop of Dahyabhai Aditram Chokshi where she stated that she had sold the ornaments in the shop owned by Chokshi Dahyabhai Aditram. At that time one Mehtaji was present in the said shop, and, after interrogation, he had admitted that the present appellant had sold ornaments weighing 50 grams and 300 mg on March 31, 1992 and she was paid an amount of Rs.17,000/-. A written chit was also produced by Kalidas Ambalal to the effect that the appellant had sold ornaments weighing about 50 grams and 300 mg. The said golden ornaments were converted into one gold ingot and that gold ingot was recovered under a panchanama in the presence of two independent panchas. P.W.13, PI, S.S. Chudasama, had sent all the incriminating articles alleged to have been used in the commission of crime to the Forensic Science Laboratory ('FSL' for short) for analysis. On receipt of

the report from the FSL, and after completing the investigation, P.W.13, PI, S.S. Chudasama, submitted chargesheet against the appellant and one Manojkumar Alias Raghuvir Parigar, in the Court of the learned Metropolitan Magistrate, Ahmedabad, which came to be registered as Criminal Case no.626 of 1992 for the offences punishable under Sections 302, 397, 201, 120B, 114 of the Indian Penal Code and Section 135(1) of the Bombay Police Act. As the offence under Sections 302, 392 and 397 are exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad, committed the case to the Court of Sessions for trial, where it came to be numbered as Sessions Case No.306 of 1992.

3. Charge Exh.4 was framed against the appellant and accused no.2 who has been acquitted, for the offences punishable under Sections 302, 397 read with Section 34 and Section 114 of the Indian Penal Code. The charge was explained and read over to the appellant and other accused wherein they pleased not guilty and claimed to be tried. In order to prove charges against the accused persons, the prosecution examined the following witnesses. (1) P.W.1, Natvarlal Ishwarlal, Exh.15; (2) P.W.2, Ravindra Prempal Ravat, Exh.17; (3) P.W.3, Shilaben Deviram, Exh.18; (4) P.W.4, Hasmukhlal Chimanlal Bhavsar, Exh.19; (5) P.W.5, Nagmani Narayan, Exh.20; (6) P.W.6, Govindbhai Laljibhai Dhobi, Exh.21; (7) P.W.7, Kalidas Ambalal Chokshi, Exh.23; (8) P.W.8, Shankarbhai Maganbhai Patel, Exh.24, (9) P.W.9, Hargovanbhai Melabhai, Exh.26; (10) P.W.10, Executive Magistrate, Navnitbhai Sundarbhai Parmar, Exh.28; (11) P.W.11, Panch of recovery panchanama, Yunusbhai Kasambhai, Exh.31; (12) P.W.12, Nayankumar Natvarlal Parikh, Tuitor of FSL, Exh.41, and (13) P.W.13, PI, S.S. Chudasama, Exh.43. The prosecution also produced documentary evidence such as inquest panchanama, post-mortem notes, panchanama of scene of offence, panchanama of identification parade, chit recovered from the shop of Chokshi Dahyabhai Aditram with regard to stolen golden ornaments, discovery panchanama and the report of the FSL, etc, to prove the case against the appellant and other accused persons. After recording of the evidence of the prosecution witnesses was over, the appellants and other accused persons were questioned generally and their statements came to be recorded under Section 313 of the Code of Criminal Procedure. In the further statement, the case of the appellant and other accused was of general denial.

4. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence, and

after hearing the arguments of the learned Additional Public Prosecutor and the learned counsel for the defence, held that deceased Jayshreeben had died homicidal death. It was further held that this was a case of circumstantial evidence and the prosecution had proved the following circumstances which pointed towards the guilt of the present appellant for having committed the offences punishable under Section 392 read with 397 and 34 of the Indian Penal Code and under Section 302 read with 34 of the Indian Penal Code:

(1) Accused No.3 was staying opposite to the house of Nagmani from whom she had borrowed Rs.400/- for medical treatment and subsequently accused no.3 wanted more money for which she was insisting Nagmani to get the same through Hasmukhbhai. It is in the evidence of Hasmukhbhai that he had taken accused no.3 at the house of complainant Natvarbhai for getting the amount of Rs.1500/- for which Natvarbhai showed inability to pay the same.

(2) The present incident happened thereafter on 31.5.1992 at about 10 a.m. in the flat of Natvarbhai wherein his wife Jayshreeben was alone in the house.

(3) The neighbouring persons of the flat owners heard the scream of Jayshreeben and so they all gathered on the second floor where the flat of Jayshreeben is situated.

(4) Out of the neighbouring flat owners, majorities were ladies and they all gathered near the flat of Jayshreeben which was closed from inside.

(5) There is evidence of witness Ravindra Prempal who was also present at the time of the incident as he was staying on the third floor and it is in his evidence that he had seen one female from the back window of Natvarbhai's flat and that lady was telling that Jayshreeben is shouting because she had received burn injuries. This witness Ravindra Prempal identified accused no.3 as the lady whom he saw in the flat of Jayshreeben.

(6) There is evidence of witness Shilaben to show that she had seen one female and male coming out of the flat of Jayshreeben at the time of incident and she also told her that Jayshreeben has burns injuries and, therefore, she is shouting and then both ran away.

(7) This witness Shilaben also subsequently identified accused No.3 in the identification parade which was held on 31.5.1992.

(8) There is also evidence of Police Inspector Shri Chudasama that accused No.3 was brought from village Malai of Jonpur district in Uttar Pradesh by PSI Patel on 27.5.1992 which shows subsequent conduct of accused No.3 after the alleged incident.

(9) There is also evidence of P.I. Chudasama that when accused No.3 was brought by PSI, Patel from Uttar Pradesh, panchanama of her person was made in which one suitcase was also found from accused No.3 and that in the said suitcase there was one sari of rose colour having dots and a bunch of keys were attached under the panchanama.
(10) There is also evidence of panch witness Yunusbhai Kasambhai, Exh.31, and the Investigating Officer, Shri Chudasama that on 4.6.1992 while accused no.3 was in police custody she had voluntarily shown the place where the muddamal ornaments were sold and she led the police to the shop in Manekchowk from where one golden ingot weighing 49 GMs and 300 Mgs and one chit were produced by witness Kalidas and they were attached under a panchanama.

5. The learned Additional Sessions Judge, by the impugned judgment and order, convicted the appellant under Section 392 read with 397 and 34 of the Indian Penal Code and under Section 302 read with 34 of the Indian Penal Code, and sentenced her to undergo R.I. for seven years and fine of Rs.500 in default R.I. for two months and R.I. for life and fine of Rs.500 in default R.I. for two months, which has given rise to filing of the present appeal. It may be mentioned that the original accused No.2 was acquitted from the charges framed against him.

6. Learned advocate, Mr. P.M. Vyas and learned Additional Public Prosecutor, Mr. S.S. Patel, have taken us through the entire record and proceedings of the appeal.

7. Learned advocate, Mr. P.M. Vyas, for the appellant, has vehemently submitted that the prosecution case solely rests on the circumstantial evidence and the evidence led by the prosecution has not been proved beyond reasonable doubt. Learned advocate, Mr. P.M. Vyas, for the appellant, has submitted that P.W.2, Ravindra Prempal Ravat, and P.W.3, Shilaben Deviram, had no proper opportunity to see the appellant who was alleged to have been inside the flat of P.W.1, Natvarlal Ishwarlal. It is submitted that the incident in question had taken place on March 31, 1992 whereas the identification parade was held after two months i.e. on May 29, 1992 and the witnesses could not have identified the present appellant as accused after the gap of two months. It is submitted that the evidence of test identification parade was highly doubtful and, therefore, the present appellant cannot be convicted. Learned

advocate, Mr. P.M. Vyas, for the appellant, has further submitted that the discovery panchanama was also not proved beyond reasonable doubt as the presence of panch witness, Yunusbhai Kasambhai, at the time of drawing of preliminary panchanama and at the time of recovery of gold ingots from the shop of Chokshi Dahyabhai Aditram was highly doubtful. It is submitted that the recovery of stolen ornaments was not proved beyond doubt by the prosecution. Learned advocate, Mr. P.M. Vyas, for the appellant, has further submitted that the prosecution has not proved that the present appellant had sold the stolen ornaments at the shop of Chokshi Dahyabhai Aditram, as the Manager of the shop, Kalidas Ambalal Chokshi, had turned hostile and had not supported the prosecution case. It is, therefore, submitted by the learned counsel for the appellant that the prosecution has not proved the case against the appellant beyond reasonable doubt and, unless the whole chain of circumstances is established by the prosecution, the appellant cannot be convicted for the offence under Section 302 of the Indian Penal Code. It is, therefore, submitted that the appeal may be allowed and the conviction and the sentence be quashed and set aside.

8. Learned APP, Mr. S.S. Patel, on the other hand, has submitted that the prosecution has proved the case against the appellant beyond reasonable doubt by leading cogent and convincing evidence. It is submitted that P.W.2, Ravindra Prempal Ravat, and P.W.3, Shilaben Deviram, had ample opportunity to see the present appellant at the time of commission of crime in the flat of P.W.1, Natvarlal Ishwarlal, and, subsequently, they had identified the appellant in the test identification parade which was held on May 29,1992. The learned APP has submitted that, prior to two days of the incident, the present appellant had gone to the flat of P.W.1, Natvarlal Ishwarlal in the company of P.W.4, Hasmukhlal Chimanlal Bhavsar, as she was in great need of money. The learned APP has submitted that the conduct of the appellant and other absconding accused persons, namely, Omprakash and his brother Jaiprakash, to run away after the occurrence of the incident to Uttar Pradesh, also indicated that they were the persons to be held responsible for causing the murder of Jayshreeben and committing robbery in the flat of P.W.1, Natvarlal Ishwarlal. The learned APP has also submitted that the discovery panchanama by which it was proved that the appellant had sold away the stolen gold ornaments at the shop of Dahyabhai Aditram, was proved beyond reasonable doubt that the absconding accused persons had joined hands to commit murder of Jayshreeben while committing

robbery in her flat. It is submitted that the prosecution had proved beyond reasonable doubt that the prosecution had established complete chain of circumstances which pointed towards the guilt of the appellant and, therefore, the appeal deserves to be dismissed.

9. We have carefully examined the record and proceedings and reappreciated oral as well as documentary evidence. It is not in dispute that Jayshreeben, wife of P.W.1, Natwarlal Ishwarlal, had died homicidal death on March 31, 1992. The evidence of P.W.12, Dr. N.N. Parikh, and the post-mortem report exh.42 had proved beyond doubt that deceased Jayshreeben had died homicidal death on March 31, 1992.

10. It is relevant to notice that the prosecution has not claimed that the incident in question was witnessed by any one and no direct evidence regarding the incident is tendered before the Court. Admittedly, the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or, are, not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that

before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. In Sharad v. State of Maharashtra, AIR 1984 SC 1622, after referring to earlier case-laws, the Supreme Court has summarised the conditions to be fulfilled in a case based on circumstantial evidence as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of a conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts, called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relations to the facts of the particular case.

11. In the light of the abovereferred to principles

laid down by the Apex Court in catena of decisions, we will now examine the case of the prosecution whether the circumstances, which are held to have been proved by the learned Additional Sessions Judge, were established beyond pale of doubt. The evidence of P.W.2, Ravindra Prempal Ravat, and testimony of P.W.3, Shilaben Deviram, who is the mother of P.W.2, in our opinion, do not prove beyond doubt that they had ample opportunity to watch the appellant who was alleged to have been inside the flat at the time of commission of offence. According to the evidence of P.W.2, Ravindra Prempal Ravat, he had climbed the iron-shed of the flat of one Popatbhai which was situated on the ground floor. He admitted that he had seen from a gap of about 10 cm. through the rear window of the flat of P.W.1, Natvarlal Ishwarlal, that the appellant was standing in the flat and, when the witness enquired why the deceased Jayshreeben was raising shouts, she had replied that she had sustained burn injury and, therefore, she was raising shouts. In our opinion, from the position in which the witness was standing, i.e. on the iron-sheet (weather-shed), it was not probable for the witness to observe and see the features of the appellant. The gap of 10 cm. was not enough so as to enable the witness to see the features of the appellant. The witness had admitted that there was full curtain on the rear-window of the flat. There were contradictions brought in the evidence of P.W.2, Ravindra Prempal Ravat, to the effect that he had not stated before the police in his statement that one lady who was in the flat had told him that as Jayshreeben had sustained burn injuries, she was raising shouts. The contradictions and omissions brought during the evidence of P.W.2, Ravindra Prempal Ravat, in our opinion, raise serious doubt as to whether he had sufficient opportunity to watch and see the appellant remaining present in the flat. The evidence of P.W.3, Shilaben Deviram, has also not proved beyond doubt that she had opportunity to see the appellant in the flat of P.W.1, Natvarlal Ishwarlal. The oral testimony of P.W.2, Ravindra Prempal Ravat and P.W.3, Shilaben deviram, in our view, is not trustworthy and reliable and does not inspire confidence to come to the conclusion that they had seen the appellant in the flat on the day of the incident. The evidence of the test identification parade, which was held after gap of two months, also cannot be relied upon to hold that the appellant was the lady who was present at the time of the incident in the flat of P.W.1, Natvarlal Ishwarlal. The circumstances on which the learned Additional Sessions Judge had relied for holding guilt of the appellant, are, in our opinion, not proved beyond pale of doubt. The circumstances, as observed by the learned Additional Sessions Judge, had

not completed the whole chain which could have only pointed towards the guilt of the appellant. The evidence with regard to appellant having sold the stolen ornaments to the shop of Chokshi Dahyabhai Aditram was also not proved beyond doubt. The evidence of panch, P.W.11, Yunusbhai Kasambhai, and the Manager of the shop, Kalidas Ambalal Chokshi, was also not supporting the case of the prosecution beyond pale of doubt that the appellant was the person who had sold away the golden ornaments to the shop of Chokshi Dahyabhai Aditram. If the whole chain of circumstances is not complete, in our opinion, it would not be legal to hold the appellant for having committed the offences under Section 392 read with 397 and 34 of the Indian Penal Code and under Section 302 read with 34 of the Indian Penal Code, No evidence was led to prove that the appellant had shared common intention with the absconding accused, Omprakash and his brother Jaiprakash for hatching the plan of committing robbery and, in that process, had committed murder of deceased Jaishreeben. When the entire evidence led by the prosecution did not complete the whole chain of circumstances leading and pointing out the guilt of the appellant, in our opinion, the benefit of reasonable doubt should be extended in favour of the appellant.

12. For the reasons stated above, the appeal is allowed. The conviction of the appellant, Punam @ Shobha Omprakash, (original accused No.3), under Section 392 read with 397 and 34 of the Indian Penal Code and under Section 302 read with 34 of the Indian Penal Code, and the sentence imposed on her to undergo R.I. for seven years and fine of Rs.500 in default R.I. for two months and R.I. for life and fine of Rs.500 in default R.I. for two months, recorded by the learned Additional City Sessions Judge, Court No. VIII, Ahmedabad, in Sessions Case No.306 of 1992, are quashed and set aside. The appellant is on bail and her bail bonds shall stand cancelled. The muddamal be destroyed in terms of the directions contained in the impugned judgment and order.

January 21, 2003 (M.H.Kadri, J.)

(Akshay H. Mehta, J.)
(swamy)